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MAR 16 2009

OFFICE OF PETITIONS

In re Application of	:	
Palmaz et al.	:	
Application No.: 09/707685	:	DECISION ON
Filing or 371(c) Date: 11/07/2000	:	PETITION
Attorney Docket Number: 6006-015	:	

This is a decision in response to the petition for withdrawal of abandonment, filed February 10, 2009, wherein Applicant alleges non-receipt of a Decision of the Board of Patent Appeals and Interferences. The petition is properly treated under 37 CFR 1.181.

This Petition is hereby **dismissed**.

Any further petition must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under [insert the applicable code section]." This is **not** final agency action within the meaning of 5 U.S.C. § 704.

Background

The above-identified application became abandoned because of the Decision of the Board of Patent Appeals and Interferences, mailed September 30, 2008, and because the period for seeking court review of the Decision expired, and there are no claims allowed. The time for seeking review of a decision of the Board by the Court of Appeals for the Federal Circuit or the U.S. District Court for the District of Columbia is the same for both tribunals, that is, 2 months, or 2 months with the extension provided by 37 CFR 1.304 in the event a request for rehearing is timely filed before the Board, or as extended by the Director. See MPEP § 1216. Because the period for seeking court review of the Decision expired, and there are no claims allowed, the application became abandoned for failure to file a complete and proper reply to the final office action, mailed November 2, 2006. No complete and proper reply having been filed, the application became abandoned on February 3, 2007. A Notice of Abandonment was mailed December 10, 2008.

The present petition

Applicant files the present petition and asserts nonreceipt of the Board decision. In support of this assertion, Applicants state that a mailed copy of the Board decision was not received. Applicants also file a copy of a Declaration of Suzanne M. Cotugno, a copy of "an application file jacket for the above-captioned patent application," and an individual docket report for the above captioned application. Petition at p.2. Applicants assert that an inspection of the documents reveals detailed and methodical procedures that Applicant's representative employs to take in and sort mail, enter communication documents received from this Office into physical and electronic records, place the original communication document into a physical file and place an electronic copy of the original document into an electronic docketing system, and provide patent practitioners in the office of applicant's representative with docket reports by which matters are noticed and attended to timely.

Applicable Law, Rules and MPEP

The MPEP 711.03(c)A, Petition To Withdraw Holding of Abandonment Based on Failure To Receive Office Action, provides

In *Delgar v. Schulyer*, 172 USPQ 513 (D.D.C. 1971), the court decided that the Office should mail a new Notice of Allowance in view of the evidence presented in support of the contention that the applicant's representative did not receive the original Notice of Allowance. Under the reasoning of *Delgar*, an allegation that an Office action was never received may be considered in a petition to withdraw the holding of abandonment. If adequately supported, the Office may grant the petition to withdraw the holding of abandonment and remail the Office action. That is, the reasoning of *Delgar* is applicable regardless of whether an application is held abandoned for failure to timely pay the issue fee (35 U.S.C. 151) or for failure to prosecute (35 U.S.C. 133). To minimize costs and burdens to practitioners and the Office, the Office has modified the showing required to establish nonreceipt of an Office action. The showing required to establish nonreceipt of an Office communication must include a statement from the practitioner describing the system used for recording an Office action received at the correspondence address of record with the USPTO. The statement should establish that the docketing system is sufficiently reliable. It is expected that the record would include, but not be limited to, the application number, attorney docket number, the mail date of the Office action and the due date for the response.

Practitioner must state that the Office action was not received at the correspondence address of record, and that a search of the practitioner's record(s), including any file jacket or the equivalent, and the application contents, indicates that the Office action was not received. A copy of the record(s) used by the practitioner where the non-received Office action would have been entered had it been received is required.

A copy of the practitioner's record(s) required to show non-receipt of the Office action should include the master docket for the firm. That is, if a three month period for reply was set in the nonreceived Office action, a copy of the master docket report showing all replies docketed for a date three months from the mail date of the nonreceived Office action must be submitted as documentary proof of nonreceipt of the Office action. If no such master docket exists, the practitioner should so state and provide other evidence

The showing outlined above may not be sufficient if there are circumstances that point to a conclusion that the Office action may have been lost after receipt rather than a conclusion that the Office action was lost in the mail (e.g., if the practitioner has a history of not receiving Office actions). (Emphasis supplied).

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Telephone inquiries concerning this matter should be directed to the undersigned at (571) 272-3232.

/Derek L. Woods/
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